

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP912/2018

CATCHWORDS

Domestic Building Contracts Act 1995 – s.41 – contracts determined – entitlement of Applicant to reasonable price for work carried out before termination – how calculated – available evidence – onus of proof on Applicant to show entitlement beyond what has been paid – mutual abandonment – acknowledged that Applicant is entitled to reasonable price for work done – how calculated – Tribunal to do its best on the evidence produced

APPLICANT	Imagination Developments Pty Ltd (ACN: 106 934 650)
RESPONDENT	Common Equity Housing Limited (ACN: 006 546 658)
WHERE HELD	Melbourne
BEFORE	Senior Member R Walker
HEARING TYPE	Hearing
DATE OF HEARING	23 July 2019
DATE OF ORDER	28 October 2019
CITATION	Imagination Developments Pty Ltd v Common Equity Housing Ltd (Building and Property) [2019] VCAT 1662

ORDER

1. Order the Respondent to pay to the Applicant \$7,163.46.
2. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For Applicant

Mr D Burrows, Director

For Respondents

Ms N. Lenga, of Counsel

REASONS

Background

- 1 The Applicant is a building contractor. Its director is a Mr Burrows. The Respondent is a provider of residential accommodation and owns numerous houses and units throughout Melbourne in which such accommodation is provided. Repairs, maintenance and updating of the various houses and units that it owns are the responsibility of its employee, Mr Drake.
- 2 Between the end of 2015 and July 2017, at the direction of Mr Drake, the Applicant was engaged by the Respondent to carry out building work for the Respondent on a number of sites.
- 3 In early 2017, disputes arose between Mr Burrows and Mr Drake, as a result of which the Respondent purported to unilaterally terminate the contracts for carrying out work on the four projects that the Applicant was working on at the time.

Termination

- 4 Termination of the contracts in regard to two of the jobs was said to be on the basis that the Applicant had unreasonably suspended work and so was in breach of the contract. The Applicant contends that the suspensions were reasonable and related to Occupational Health & Safety issues. Mr Burrows argued that it was the Respondent that repudiated the contract in each case by purporting to terminate the two contracts on that ground.
- 5 In the remaining two cases, termination was on the basis of s.41 of the *Domestic Building Contracts Act 1995*. That section provides (where relevant) as follows:

“Ending a Contract if completion time or cost blows out for unforeseeable reasons

(1) A building owner may end a major domestic building contract if—

(a) either—

(i) the contract price rises by 15% or more after the contract was entered into; or

(ii) the contract has not been completed within 1½ times the period it was to have been completed by; and

(b) the reason for the increased time or cost was something that could not have been reasonably foreseen by the builder on the date the contract was made.

(2) For the purposes of subsection (1), any increased time or cost that arises as a result of a prime cost item or a provisional sum or that is caused by a variation made under section 38 is to be ignored in calculating any price rise or increase in time.

(3) To end the contract, the building owner must give the builder a signed notice stating that the building owner is ending the contract under this section and giving details of why the contract is being ended.

.....

(5) If a contract is ended under this section, the builder is entitled to a reasonable price for the work carried out under the contract to the date the contract is ended.

(6) However, a builder may not recover under subsection (5) more than the builder would have been entitled to recover under the contract.

.....”

- 6 Following the purported terminations, the Applicant accepted that the contracts were at an end and sent invoices to the Respondent for the amount that it claimed was due to it in each case, purporting to give credit for the proportion of the contract scope of works that it had not carried out. The Respondent subsequently paid to the Applicant what Mr Drake claimed was the value of the work done for each job. Mr Burrows was dissatisfied with the amount paid in each instance.
- 7 The Applicant has brought this proceeding to recover the further amounts that it claims with respect to these four jobs.

The hearing

- 8 The matter came before me for hearing on 23 July 2019 with two days allocated. Mr Burrows represented the Applicant and the Respondent was represented by Ms Lenga of Counsel.
- 9 I heard evidence from the two principal witnesses, Mr Burrows and Mr Drake, in regard to all of the jobs. I also heard evidence from a Mr Esposito in regard to the job in Carlton, from a Mr Mosley from the Master Builders’ Association who was called but gave no relevant evidence and from Ms George, the Respondent’s Asset Manager, who gave evidence as to the Respondent’s internal procedures. There is no reason to disbelieve any of the witnesses.
- 10 At the conclusion of the evidence I informed the parties I would provide a written decision.
- 11 Both Mr Burrows and Mr Drake have had extensive experience in building work and are equally qualified to assess the cost of carrying it out.

The contracts

- 12 Mr Drake said that his practice was to go out to a house or unit requiring work, prepare a scope of works and put the job out to tender to 2 or 3 builders. The tender documents comprised a list of the items of work to be done, accompanied by a simple hand drawn plan that he would prepare. These documents would then be annexed to the form of contract that the Respondent entered into with the successful tenderer. Mr Drake said that he would usually attend the site at the start of each job and three or four times

during the performance of the work. He said that this practice was followed in regard to the four jobs in question. In each case, there was a quotation prepared by Mr Burrows which was based upon the scope of works and sketch plan prepared by Mr Drake and these documents were annexed to a printed form of contract. Those contracts are in evidence.

- 13 Mr Burrows said that the relationship between the parties began near the end of 2015. He said that Mr Drake initially gave him a couple of jobs and that he was very happy with the Applicant's work. All of the properties where work was carried out were tenanted, except for the Carlton job which seems to have been a derelict house.
- 14 Difficulties then arose. Mr Burrows complained about some of the instructions that he said Mr Drake had given him and there were a number of arguments between them as to various matters, particularly, the removal of asbestos, the fact that the properties he was working on were tenanted, the behaviour of the tenants and payment of his accounts.
- 15 It also appears that the two men had incompatible views as to how the various jobs should be done. Mr Drake wanted the jobs done quickly and economically whereas Mr Burrows, who seemed to take considerably longer than the times Mr Drake had allowed, thought that Mr Drake "cut corners". Ultimately, Mr Burrows suspended works and then, the relationship between the parties came to an end.
- 16 There is insufficient evidence before me to determine whether or not the two suspensions of work by the Applicant were justified. However, the Respondent did not claim that it was entitled to damages for breach of contract. Rather, it was content to determine the contract in each case and pay the Applicant a fair price for what it had done.
- 17 Similarly, upon receipt of the notice of termination in each case, Mr Burrows accepted that the contract was at an end and sent invoices for the work that the Applicant had completed to that time. In response, the Respondent paid the Applicant what Mr Drake considered was the value of the Applicant's work.

Methodology

- 18 In regard to the two jobs terminated under s.41 of the Act, I must make an assessment of a reasonable price for the work the Applicant has done. Even in regard to the other two jobs, it was acknowledged that the Applicant was entitled to be paid a proportion of the contract price, equivalent to the percentage of the contract scope of works that it had performed.
- 19 No expert evidence was given by a quantity surveyor or other expert as to the value of the Applicant's work. Instead, in regard to all but the Carlton job, each party listed what it claimed remained to be done under the contract and deducted the cost of carrying out that work from the contract price. The proceeding on both sides was presented on this basis. It does not seem to me that that is an appropriate methodology. What should be valued

Electrical fit off	\$ 200.00
Fit vanity	\$ 80.00
Labour	<u>\$ 640.00</u>
	<u>\$2,290.00</u>

26 Mr Drake said in evidence that only 70% of the work had been completed. A replacement contractor was engaged who complete the work at a cost of \$8,151.00, including GST.

27 In assessing the degree of completion of the work I must have regard to the scope of works attached to the contract.

28 In a written assessment that Mr Drake made on 1 March 2017 of the work done by the Applicant, he noted that the following items of work and materials were required to finish the job, most of which were acknowledged by Mr Burrows:

Fit vanity and basin; supply and connect waste; fit all tapware to basin, bath and shower; fit towel rails and grab rail to shower; supply and fit shower screen; fit architrave to underside of window; supply and fit power point; fit the door in the bathroom; fit timber doorstops; supply and fit doorstop; caulk all tiled areas; fit right-hand side architrave; supply and fit timber bead to the left hand side architrave; paint bathroom ceiling, walls and all timber work.

29 The respective costings of the incomplete items are as follows:

(a) Tipping fee \$150.00

It appears to be agreed that there was rubbish left on site and Mr Drake allowed \$150.00 for the cost of removing it. Mr Burrows said that this is taken up in his figure for labour but I think there would have been tipping charges incurred.

(b) Complete installation of a sliding glass door

This appears to be minor work to supply and install a white aluminium angle. The photographs produced shows the exterior of the door. Mr Burrows said that this was not within the scope of works. The sliding glass door was a variation, and since the Applicant has been paid for it, I shall take the small amount of work involved into account in assessing the labour component of the remaining work.

(c) Skirting tiles in toilet

The photograph relied upon shows the bathroom where the wall tiling has been extended to the floor. Mr Drake suggested that there should have been a row of skirting tiles for the toilet. Mr Burrows said that that was not within the contract. He said that the Applicant tiled the floor of the toilet, which was a separate room, as a variation and there was no agreement to provide skirting tiles. His evidence is supported by a photograph. I am not satisfied as to this item.

(d) The vanity unit \$80.00

Mr Burrows allowed \$80.00 to fit the vanity unit that the Applicant had supplied. The plans for the bathroom required a space of 900 mm to be left between the bath hob and the wall. Mr Drake said that the new contractor who took over the job told him that the space between the bath and the wall where the vanity was to be installed was only 850 mm and that the vanity unit supplied by the Applicant would not fit. It does not appear that Mr Drake took this measurement himself.

Mr Drake said that the vanity unit supplied by the Applicant could not be used and he authorised a replacement unit to be made which the new contractor fitted into the space. He said in a note of his inspection that the Applicant had made the hob for the bath too wide. The Respondent claimed an amount of \$1,230.00 for the cost of the replacement vanity. Mr Burrows asked Mr Drake in cross-examination where the original vanity that the Applicant supplied was, and he said that he did not know.

Mr Burrows said that the space that was left by the Applicant for the vanity was 900 mm as specified and that the vanity that he supplied would have fitted. There is a photograph in the Tribunal book of the space that was left but it is not possible to see from that whether the space was 850mm or 900mm. However, the hob for the bath appears from the photograph to be not much larger than the bath itself and it is difficult to see how it could have been made any smaller, given that the hob needed to have a timber frame. Although one might wonder why the second contractor would have had another vanity built if the one supplied by the Applicant had fitted, Mr Burrows has given sworn evidence of the size left for the vanity and in the absence of evidence from the replacement contractor I think, as a matter of law, I must accept that evidence.

(e) Plumbing fit off \$320.00

Mr Drake said that the waste pipe for the vanity had not been roughed in. There is a hole in the floor shown in the photograph and no waste pipe above floor level. Mr Drake's complaint was simply that the waste had not been brought through the floor and that is apparent from the photograph. Mr Burrows said that the waste would have been sealed at floor level with a collar.

Mr Drake allowed \$120.00 for labour and \$60.00 for materials to rough in the pipe. He also allowed \$640.00 to fit the tapware in the basin, bath and shower. This contemplated a new plumber coming onto site. Mr Burrows allowed \$320.00 for the whole of the plumbing fit-off on the basis that that was what his plumber would have charged him.

It does not appear to me from the photographs and the descriptions given that there was a great deal for a plumber to do. I accept that the Applicant could have completed the plumbing fit off for \$320.00.

- (f) Electrical fit off \$200.00

There was very little to be done in the way of an electrical fit off. Mr Drake allowed \$250.00 instead of \$200.00 because, he said, it would be a different electrician and he would charge for travelling. Since this is not a claim for damages for incomplete work, that is the wrong approach. The cost to the Applicant if the job had proceeded, is generally a more appropriate starting point from which to calculate the proportion of the contract price that was not earned. The applicant's margin and GST will need to be added to the gross cost, but this will be done below.

- (g) Supply and install shower screen \$675.00

Mr Drake said that, to supply and install a shower screen would cost \$900.00. Mr Burrows said that the cost was only \$450.00 and produced supporting evidence in the form of a brochure from a supplier of the components of the shower screen he was intending to install which would seem to support his claim. Mr Drake said that they could not use shower screens of that type but did not say that he had ever told Mr Burrows that. Mr Burrows said that the shower screen that he proposed to use meets Australian standards and that is indicated on the brochure that he produced.

What I have to assess is not what it would have cost the Applicant to supply a shower screen or what it subsequently cost the Respondent to supply one. The task is to assess the value of the work done and the shower screen was not supplied. Hence the value of the shower screen the Applicant would have supplied is not the point. Considering that Mr Burrows probably costed the job on the basis of his lower figure and Mr Drake probably assessed the quotation on the basis of his higher figure, I think that the appropriate course is to average the two figures and allow \$675.00 as the base cost.

- (h) Painting \$750.00

Mr Drake allow \$900.00 for painting, whereas Mr Burrows said that his painter had agreed to paint the bathroom for \$600.00. He said that this price included preparation as well as the requisite number of coats of paint. I see no reason to disbelieve his evidence but since the painting was not done, what the Applicant would have been charged is not to the point. For the reasons already given I should adopt a midpoint of \$750.00 as the base cost.

- (i) Labour \$960.00

Mr Drake allowed in his assessment for two days to fit the towel rails and grab rail to the shower. It appears that this also included caulking

of all the tiled areas and the other work to be done. He said that a timber bead had to be fitted around the mirror cabinet, a new privacy set had to be supplied and the trapdoor under the house had to be fixed.

Mr Burrows pointed out, correctly, that a timber bead around the mirror was not mentioned in the scope of works. Mr Drake said that it should be done to finish the installation of the vanity in the good and workmanlike manner but it appears from the evidence that that could have been done as part of the caulking. Mr Drake also listed work to be done to the trapdoor under the house but that is also not mentioned in the scope of works. Even so, allowing for the additional work to finish the sliding door and the additional caulking around the mirror, I will allow one and a half days which, at the rate given, is \$960.00.

(j) Other matters

Mr Drake complained that a privacy set had to be supplied. Mr Burrows said that the privacy set was on site and did not need to be supplied. That is sworn evidence. Although Mr Drake's replacement contractor might have found no privacy set on site, the property was occupied by a tenant at the time. There is no reason to disbelieve Mr Burrows' evidence that he brought the privacy set to the site and that it was there when the contract was terminated.

30 On the basis of the foregoing findings, the total base cost for the uncompleted work is assessed at \$3,135.00. If one adds a 15% margin and GST and takes that figure from the contract price, the value of the uncompleted work including margin and GST becomes \$3,965.78. Deducting that from the contract price of \$19,250.00 would suggest that the value of the completed work was \$15,284.23.

31 The Respondent has paid the Applicant \$11,498.87, as follows:

Deposit	\$ 1,925.00
Payment	\$ 6,737.50
Final payment	<u>\$ 2,836.37</u>
Total	<u>\$11,498.87</u>

32 The difference between these two figures is \$3,785.36, which is the amount that will be allowed.

Santa Barbara Drive, Frankston **\$1,826.66**

33 This was another bathroom renovation. The contract price was \$18,850.00.

34 A deposit of \$1,885.00 was paid and the Applicant commenced work in late November 2016. In the course of the work, the Applicant received a progress payment of \$6,597.50. By letter dated 28 April 2017, the Respondent terminated the contract.

35 On 10 May 2017 the Applicant rendered a further invoice to the Respondent for \$7,540.00 for its work, on the basis that it had done 85% of the contract works, being to the value of \$16,022.50. Mr Drake considered that only 63% of the work had been done and so the Applicant was paid only \$3,975.45.

36 Mr Burrows said that the claim for 85% of the work for the Santa Barbara job was on the basis that the reasonable cost of completing the remaining work would have been \$2,718.20, calculated as follows:

Plumbing fit off	\$ 320.00
Electrical fit off	\$ 200.00
Painting	\$ 600.00
Cabinet maker -vanity	\$ 508.20
Shower screen	\$ 450.00
Finish off (labour)	<u>\$ 640.00</u>
Total	<u>\$2,718.20</u>

37 He said that, consequently, the applicant was entitled to 85% of the contract price, which is \$16,362.50, because the remaining work would cost less than the remaining 15%.

38 In a written assessment that Mr Drake made on 1 March 2017 of the work done by the Applicant, he noted that the following items of work and materials were required to finish the job:

Supply new architraves to window and door; supply and fit new privacy lock; supply and fit new vanity and basin; supply and fit new band basin mixer; supply and fit bath outlet and mixer; supply and fit handheld shower and mixer; supply and fit new shower screen; supply and fit grab rails x 3; caulk all tiles; supply and fit power point under mirror cabinet; supply and fit doorstep; prepare and paint bathroom; clean and remove all Applicants waste from site.

He also noted that the Applicant had marked the carpet outside the bathroom, with the plumber's glue.

39 He produced photographs to support his assessment and said that a replacement contractor and was engaged to complete the work at a cost of \$6,500.00, including margin and GST.

40 Mr Burrows acknowledged that he had not supplied the vanity unit at the time the contract was terminated but said that the privacy lock, the basin mixer, the bath outlet and mixer, the handheld shower and mixer and the grab rails were all on site. As to the missing items, the Applicant was last on site in early February and over three weeks had elapsed before Mr Drake compiled his list and made his assessment. During that period, the property was tenanted and there were other people on site. I think I should accept Mr Burrows' sworn evidence that the items were supplied.

41 As to the other items, my findings are as follows:

- (a) New architraves, privacy lock, basin mixer, the bath outlet and mixer, the handheld shower and mixer and grab rails.

I accept that these were supplied. The only issue is the labour component referred to below.

- (b) Supply of new vanity and basin \$924.00

Although, in his assessment, Mr Drake had said that the vanity unit would cost \$924.00, Mr Burrows said that the Applicant's cabinet maker would have supplied it to the Applicant for \$508.20. Since the vanity unit was not supplied, that is not to the point. What is relevant for this exercise is the value of the uncompleted work. The vanity unit was to be made to a design attached to the scope of works and so I think that I should take Mr Drake's figure. I also note that the figure of \$924.00 is mentioned for the vanity in a discovered document dated 10 May 2016 (Tribunal book page 210), which would indicate that that was the figure contemplated by the parties for the vanity at the time the contract was entered into.

- (c) Supply and fit new shower screen \$675.00

There was the same argument concerning this item as for Lindrum Road. For the reasons already advanced I shall allow \$675.00.

- (d) Supply and fit power point under mirror cabinet \$200.00

This is the electrical fit off for which Mr Burrows allowed \$200.00 and Mr Drake allowed \$250.00. There was very little to be done in the way of an electrical fit off and so I accept Mr Burrows' figure.

- (e) Supply and fit doorstep

Mr Burrows said, correctly, that the doorstep was not in the scope of works.

- (f) Prepare and paint bathroom \$700.00

Mr Drake said that, for a three-coat system, an allowance of \$800.00 should be made. Mr Burrows said his painter would have done it for \$600.00. I shall adopt a midpoint of \$700.00.

- (g) Labour and tipping fees \$1,110.00

The issue here was whether it would have taken one or two day's labour to carry out the remaining work not already allowed for, which includes caulking, cleaning (including removing the plumber's glue) and removing all the Applicant's waste from the site. The difference is between \$640.00 and \$1,280.00. There does not appear to have been a great deal to do but the remaining work would have required two visits the site, because the architraves would need to be fitted before the painting was carried out so I shall adopt a midpoint of \$960.00. There are also tipping fees to be allowed of \$150.00.

- 42 On the basis of the foregoing findings, the gross figure for uncompleted work is assessed at \$3,609.00. If one adds a 15% margin and GST, the value of the uncompleted work including margin and GST becomes \$4,565.38. Deducting that from the contract price of \$18,850.00 would suggest that the value of the completed work was \$14,284.61.
- 43 The Respondent has paid the Applicant \$12,457.95, as follows:
- | | |
|---------------|--------------------|
| Deposit | \$ 1,885.00 |
| Payment | \$ 6,597.50 |
| Final payment | <u>\$ 3,975.45</u> |
| Total | <u>\$12,457.95</u> |
- 44 The difference between these two figures of \$1,826.66, which is the amount that will be allowed.

Eliza Court, Seaford **\$1,551.44**

- 45 This was a more extensive renovation involving the kitchen and a ceiling as well as the bathroom. The contract price was \$29,675.00, of which \$1,500.00 was an allowance for painting the ceiling. The allowance was made because access was not provided to the work site before the contract was entered into. When Mr Burrows entered the site he contacted Mr Drake and told him that the ceiling would need to be replaced. A price of \$5,247.00 was agreed upon, less the \$1,500.00 allowance that had been made. A further variation was agreed to on 18 December 2016 with respect to changing the bathroom floor and moving a cavity slider door unit.
- 46 A deposit of \$1,483.75 was paid and the Applicant commenced work in early December 2016. In the course of the work, the Applicant received a progress payment of \$13,353.75. By a letter dated 24 February 2017 the Respondent terminated the contract before it was completed pursuant to s. 41 of the Act on the ground that the contract price, which was initially \$29,675, had increased to \$32,221.50 with an approved variation and then became \$37,468.50 due to additional kitchen ceiling works.
- 47 Mr Burrows wrote on 6 March 2013 accepting that the contract was terminated and enclosing an invoice for \$10,386.25 for the Applicant's work, on the basis that it had done contract works to the value of \$16,022.50, being 100% of the works in the kitchen and 85% of the works in the bathroom.
- 48 Mr Drake considered that only 70% of the work had been done and so only \$6,638.48 was paid. Mr Drake obtained a quotation from another contractor to complete the work at \$8,772.50, including margin and GST.
- 49 Mr Burrows said that the claim for 85% of the work for bathroom in the Eliza Court job was on the basis that the reasonable cost of completing the remaining work would have been \$2,680.00, calculated as follows:

Plumbing fit off	\$ 700.00
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Electrical fit off	\$ 250.00
Shower screen	\$ 450.00
One day's labour	\$ 640.00
Labour for work on door	<u>\$ 640.00</u>
Total	<u>\$2,680.00</u>

- 50 In a written assessment that Mr Drake made on 1 March 2017 of the work done by the Applicant, he noted that the following items of work and materials were required to finish the job:

Kitchen

Fit two power points and phone jack to splashback, caulk the splashback, prep ceiling to the kitchen and dining room for painting and paint the kitchen and dining room as per scope.

Bathroom

Supply and fit new architraves to both sides of hinged door; fit doorstops; supply and fit new privacy lock; adjust existing cavity sliding door; fit architraves to cavity sliding door; fit off two power points; supply and fit new globe to new ceiling light; fit off vanity and basin; fit off toilet and cistern; supply and fit shower screen; fit all tap ware; fit grab rails; caulk all tiling; supply and fit new band basin mixer; supply and fit bath outlet and mixer; supply and fit handheld shower and mixer; supply and fit new shower screen; supply and fit grab rails x 3; caulk all tiles; supply and fit power point under mirror cabinet; supply and fit doorstop; prepare; clean and remove all rubbish from site.

- 51 He produced photographs to support his assessment and said that a replacement contractor was engaged to complete the work at a cost of \$8,772.50, including margin and GST.
- 52 Mr Burrows acknowledged that the work in the kitchen had to be done but pointed out that painting the ceiling only had a prime cost allowance of \$1,500.00. He acknowledged that the rest of the work had to be done but said, correctly, that fitting doorstops and adjusting the existing cavity sliding door were not in the contract scope of works.
- 53 As to the other items, my findings are as follows:

(a) The missing globe

As with the previous two sites, the property was tenanted at the time of termination and there was a time gap between the Applicant leaving the site and Mr Drake making his assessment. I have no reason to reject Mr Burrows' sworn evidence that the globe was on site. I accept that it was supplied.

(b) Plumbing fit off \$700.00

Mr Drake assessed \$700.00 for the plumbing fit-off which accords with Mr Burrows' figure.

(c) Electrical fit off \$250.00

Mr Drake assessed \$250.00 for the electrical fit-off which again accords with Mr Burrows' figure.

(d) Supply and fit new shower screen \$675.00

There was the same argument concerning this item as for Lindrum Road. For the reasons already given I assess the cost at \$675.00.

(e) Painting of bathroom \$2,200.00

Mr Drake assessed an amount of \$1,000.00 to paint the bathroom and also claimed a credit of \$1,500.00 for the provisional sum of \$1,500.00 that was allowed for the painting in the kitchen and dining room. It is appropriate to allow the provisional sum, since no painting was done. As to the painting of the bathroom, for the reasons already given I assess that at \$700.00.

(f) Labour \$1,280.00

The biggest difference between the parties relates to the labour to finish the job. Mr Drake allowed \$1,280.00 for two days work for a carpenter as well as a further \$200.00 to adjust an existing cavity sliding door because, although he acknowledged that it was not within the scope of works, he said that it was a variation for which payment was made. I will allow two days for a carpenter to complete what has to be done.

(g) Garbage tipping fee \$150.00

I accept that there will be tipping fees incurred.

54 On the basis of the foregoing findings, the gross figure for uncompleted work is assessed at \$5,255.00. If one adds a 15% margin and GST, the value of the uncompleted work including margin and GST becomes \$6,647.58. Deducting that from the contract price of \$29,675.00 would suggest that the value of the completed work was \$23,027.42.

55 The Respondent has paid the Applicant \$21,475.98, as follows:

Deposit	\$ 1,483.75
Payments	\$13,353.75
Final payment	<u>\$ 6,638.48</u>
Total	<u>\$21,475.98</u>

56 The difference between these two figures of \$1,551.44, which is the amount that will be allowed.

Davis Street, Carlton

- 57 This related to the renovation of an old Victorian house in Carlton. The original agreement required the removal of the flooring from the passage, lounge and both bedrooms, removal of all rubbish from the floor area and ensuring that the cross ventilation under the floor was adequate. After work commenced it transpired that far more work was required than the Respondent had anticipated. The house was on bluestone footings and a large amount of very thick concrete also had to be cut up and removed, all by hand.
- 58 The Applicant commenced work on about 26 September 2016. The contract price was \$78,900.00, payable by a deposit of \$3,945.00 and the balance in four further stages, being base stage, frame stage, fixing stage and completion.
- 59 Thereafter, there were two variations, substantially adding to the scope of works, and increasing the contract price, first to \$127,250.00, and then to \$197,745.70. No detail was provided in the evidence of the payments actually made by the Respondent with respect to the work done except that of Mr Drake, who said that the Respondent has paid to the Applicant a total of \$27,335.00. It is unclear from his evidence whether or not this is in addition to the initial deposit of \$3,945.00.
- 60 By a letter dated 24 February 2017, the Respondent terminated the contract before it was completed pursuant to s. 41 of the Act on the ground that the price had increased as stated.
- 61 Following receipt of the notice of termination, Mr Burrows sent two invoices to the Respondent, one for \$1,402.50 and the other for \$31,328.00. In response, the Respondent paid two amounts, one of \$423.50 relating to the first invoice and \$27,335 in relation to the second invoice.
- 62 The first invoice for \$1,402.50 related to a soil test and engineering fee, including seven hours of Mr Burrows' time, waiting on site for consultants to arrive. The amount paid by the Respondent was for the cost of the soil test reports, including GST.
- 63 The second invoice was for two amounts, the first being \$4,850.00 for part payment of the base stage and the second being \$26,478 for a variation, comprising the removal of the subfloor framing and excavating the ground under the subfloor. Both amounts were inclusive of GST.
- 64 Mr Esposito gave evidence that he was the builder who took over the Carlton project. He said that he carried out the whole of the work over 3 to 4 months at a cost of \$153,402 inclusive of GST.
- 65 Unlike the other three contracts, the parties have made some attempt to directly assess the value of the work done by the Applicant in regard to this project. Mr Burrows claimed that he spent 148.6 hours on the job for which the Applicant charged \$80.00 per hour plus GST, giving a total of \$13,076.80. He said that he also incurred expenses totalling \$34,272.67,

which he listed. That would give a total value of \$47,349.47.

66 In particular, Mr Burrows said that the concrete removed was unusually thick and that it all had to be saw cut and removed by hand.

67 Mr Drake said that he valued the work done by the Applicant as follows:

Part payment base stage as per contract	\$ 4,850.00
Remove timber subfloor framing throughout	\$ 4,800.00
Cut concrete and remove concrete slabs kitchen and atrium	\$ 7,900.00
Remove contaminated soil and dig subfloor for clearance	\$ 6,000.00
Remove front garden bed	<u>\$ 1,200.00</u>
	<u>\$24,750.00</u>

68 In February and May 2017, the Applicant invoiced the respondent \$31,328.00 for the above work. The difference between this figure and the amount paid is \$3,993.00. However, the Applicant now claims that an amount of \$7,495.50 is still owed to it, being \$6,478.00 and \$1,017.50 for the balance of two invoices but I have been unable to ascertain how these amounts were arrived at.

69 Two amounts in dispute appear to be as follows:

(a) Waiting time

Mr Burrows said that he spent 7 hours waiting on site for the engineer and the soil engineer to arrive, for which the Applicant charged \$560.00 plus GST.

Mr Drake said that there was no need for him to do that because there was a key safe on site. Having heard Mr Burrows' explanation I am not satisfied that this claim is justified.

(b) Engineer's fee

Mr Burrows said that the Applicant incurred an engineer's fee of \$330.00 to the Respondent's engineer, Mr McLeod. Mr Drake said that this was paid directly to the engineer by the Respondent.

70 The list of expenses given by Mr Burrows would suggest that most of the work was done by subcontractors and his labourer. It is difficult to see from the evidence that he has presented and from the work shown in the photographs how he could justify claiming for 148.6 hours of his own labour. That would amount to 3.71 weeks of constant labour on this site. The fact that he claims seven hours for waiting on site for the engineer when there was a key safe on site would not suggest that he made efficient use of his time.

71 The onus is on the Applicant to prove that the value of its work exceeded the amounts that it has been paid and I am not able to make any finding on the balance of probabilities to that effect. Ms Lenga submitted that the

Applicant had not discharged its onus of proof and, in regard to the Carlton contract, I accept that submission.

Conclusion

72 I find that the Applicant is entitled to a further \$7,568.25 from the Respondent, calculated as follows:

Lindrum Road:	\$3,785.36
Santa Barbara Drive:	\$1,826.66
Eliza Court:	<u>\$1,551.44</u>
Total	<u>\$7,163.46</u>

73 There will be an order that the Respondent pay to the Applicant \$7,163.46.

74 Costs will be reserved, but the parties should be aware that, given s.109 of the *Victorian Civil and Administrative Tribunal Act 1998*, and the fact that this is, in terms of the amount awarded, a small claim, it is not usual to make an order for costs in a case such as this.

SENIOR MEMBER R. WALKER